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IN THE

Supreme Court of the United States

October Term, 1957

No. 253

RONALD MILLER, ET AL,
Petitioners,

v.

ROBERT W. JENNINGS, ET AL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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May It Please The Court:

In *Weil, Water Rights in the Western States*, 3rd Ed. (1911), Chapter 51, headed "Determination of Priorities by Special Proceedings in Court", describes special statutory proceedings, initiated or conducted by state administrative agencies, which are provided in a handful of states for determination of relative water rights on particular streams or segments thereof. Contrary to the assertion of the Solicitor General, this type of proceeding is not provided by statute in all the western states. In particular, no such statutory proceeding is provid-

ed in Texas, where water rights have long been adjudicated in conventional suits for injunction. *Cf., e.g., Wilson v. Reeves County W. I. Dist. No. 1*, Tex. Civ. App., 265 S.W. 346, and *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733, both cited by the court below.

That the scope of the Consent Statute is not limited to special statutory proceedings in a few states, as asserted by the Solicitor General, is clear from the text of the Consent Statute itself which expressly extends consent to "**any suit** for the adjudication" or administration of water rights. Surely, had Congress intended to limit its consent to special statutory proceedings initiated or conducted by public agencies, Congress could and would have said so.

Neither is the Consent Statute by its terms limited to cases to which all the water users of a particular stream are necessary or indispensable parties. The consent extends to ~~any suit~~ for the adjudication or administration of water rights. The only requirement as to parties is that **the United States** be a necessary party to such suit.

No amount of legislative history can alter a clear and unambiguous statute. Read in context, Senator McCarran's letter (quoted in part at Sol. Gen. Br. 7) does not even purport to do so. Looking at the whole of the Senate Report cited in the Solicitor General's brief, it is manifest that the correspondence sought only to make clear that the Consent Statute should not be utilized to delay condemnation under eminent domain of property necessary for Government Reclamation projects, whether or not water rights might be in dispute.

Senator McCarran's letter further points out that the purpose of the Consent Statute is to permit joinder of the United States wherein "it [to join the United States as a party defendant] is necessary in order to adjudicate all of the rights of the various land owners." That is, the United States may be joined when it ought to be a party "if complete relief is to be accorded between those already parties." Wherein does Senator McCarran's informal definition of "necessary party", as applied **to the United States** in a water-rights suit, differ in substance from the definition of "necessary party" found in Rule 19, Federal Rules of Civil Procedure?

Neither Senator McCarran's letter nor anything else in the legislative history indicates an intent to limit consent to cases in which parties **other than the United States** were necessary parties. On the contrary, both the Senate and the House passed the Consent Statute only upon consideration of the objection by the Justice Department:

> "The general waiver of the immunity of the United States to suits involving water rights would seem objectionable. It is likely that such a general waiver would result in the piece-meal adjudication of water rights, in turn resulting in a multiplicity of action * * *."[1]

Had the Congress indeed intended that consent be limited to particular statutory proceedings to which all water users on a stream should be necessary parties, would the Congress have calmly ignored the

[1] Letter of Deputy Attorney General, Senate Report No. 711, 82nd Cong., 1st Sess. p. 7. Same letter read to House of Representatives, Cong. Rec. 82nd Cong., p. 9445.

advice of the Attorney General that the language chosen would grant a "general waiver of immunity" to all manner of suits "involving" water rights, and would result in "piece-meal adjudication" and "multiplicity of actions?" Obviously not. There could be no "piece-meal adjudication" or "multiplicity of actions" if the consent were limited to actions to which all water users on the stream were parties.

It is, of course, the Justice Department's privilege now to tell this Court that the statutory language **does not mean** what the Justice Department expressly assured the Congress the statutory language **did mean**. But in appraising the Congressional "intent" shown by the legislative history, what counts is what the Justice Department told the Congress the statute would achieve.

All the waters in controversy are in the physical possession and control of the Reclamation officials who are named as defendants. The plaintiffs seek to enjoin such officials from withholding from plaintiffs and diverting to upstream water users the waters to which plaintiffs are entitled. If the injunction which plaintiffs seek is granted; the water supply available to such upstream water users will be correspondingly reduced. We assume, therefore, that thousands of upstream water users receiving water through the Reclamation Project are necessary parties to this action.

But the great number of the upstream water users, and the common effect upon their common water supply of the injunction which plaintiffs seek, are exactly what make it appropriate that this controversy be resolved in a class action. Rule 23 (a)

(2), Federal Rules of Civil Procedure, specifically authorizes a "hybrid" class action where "the object of the action is the adjudication of claims which do or may effect specific property involved in the action * * *." There is nothing in the Rule limiting its scope to instances wherein the property involved is in the possession of the Court, rather than in that of named defendants.

By mis-mating cases which impose stiff requirements as to "necessary" parties with cases (such as *Martinez v. Maverick District*, 219 F.2d 666) which greatly limit Rule 23, respondents conclude (a) that the water users are necessary parties because the judgment sought **will affect** the water supply in controversy, and (b) that the controversy cannot be presented in a class action because the judgment sought **will not affect** the water supply involved in the action. So self-contradictory a conclusion clearly cannot be valid. That it may be supported by authorities, however, strongly underlines the importance of the Supreme Court's intervening to place such authorities in proper focus.

That the decision of the Court below conflicts with all decisions affording vitality to Rule 23 is further shown by the fact that plaintiffs' class and the upstream defendants' class both assert that their respective water rights have been acquired by all class members **in common**, by virtue of the Rio Grande Compact and/or the old New Mexico Notice of Intent to Appropriate. (R. 60-62, pars. 3.1-3.7). And defendants assert and plaintiffs dispute that, by the relinquishment clauses of the Warren Act contracts, the plaintiffs' class **in common** granted perpetually

superior rights unto the upstream defendants' class **in common** (R. 70-72, pars. 7.1-17.2) Indeed the upstream defendants argue this **common** defense on the merits at page 24 of their Brief in Opposition. Thus this is a "true" class action in which "the character of the rights sought to be enforced for or against the class is * * * **common** * * *". Rule 23 (a) (1).

Rule 23 draws no distinction between class actions wherein the class representatives are plaintiffs and those wherein they are defendants. Notably in *El Paso District, together with the United States v. City of El Paso*, 243 F.2d 927, Pet. for Cert. pending as No. 198 this term, the Court of Appeals for the Fifth Circuit affirmed a judgment in a water rights case brought as a class action by representatives of all water users within El Paso District. This decision squarely conflicts with any holding that a water-rights case *qua* water-rights case cannot be presented as a class action.

We strongly disagree with the various contentions of the respondents to the effect (a) that the upstream defendants are entitled to win this action on its merits, (b) that for a Court to enjoin interference with water rights would transgress upon the perogatives of the Secretary of the Interior, and (c) that the Secretary of the Interior, the Elephant Butte Irrigation District of New Mexico, and/or landowners within that District are indispensable parties. However, we will not now reply to these contentions since the Court of Appeals did not discuss any of them in its opinion.

WHEREFORE, these petitioners pray the Supreme Court to issue a writ of certiorari.

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